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No. 80-205

IN THE

Supreme Court of the United States

October Term 1980

HAROLD A. TOSO,

Petitioner,

vs.

CITY OF SANTA BARBARA,

Respondent.

PETITIONER'S REPLY BRIEF. (IN SUPPORT OF PETITION FOR CERTIORARI)

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The central stategy of Responent is to execute a massive diversion from the grave and nationally widespread constitutional issues raised here, toward a quarrelsome examination of factual minutiae.[1] Petitioner suggests in reply that

[1]Petitioner sharply rejects Respondent's *ad hominem* asseverations concerning the supposed lack of accuracy in Appellant's factual presentation in the Petition (see Br. Opp. at p. 1). In truth, the shoe is on the other foot. Respondent simply ignores the trial court's findings of fact, asserting that it contended below that certain of such findings are — in Respondent's view — lacking evidentiary support. But Respondent conveniently overlooks that such self-serving contentions received no credence in the reviewing courts below. In the [second] Court of Appeal opinion presented here for review, the court below declined to reach many of such matters, while in the [first] opinion, the trial court's findings were reviewed and largely upheld. With respect to such [first] opinion — see Pet. Cert., pp. 27 et seq., Appendix B — one can scarcely believe that Respondent is serious when it effectively asserts (Br. Opp., p. 3, fn. 4) that a California state court rule concerning publication of appellate opinions somehow forbids this Court from reading a decision appearing in the West California Reporter (at 151 Cal. Rptr. 912). This argument comes too close to an endorsement of Orwell's "memory hole" for comfort. The point is that to the extent Respondent's attack on the trial court's findings was considered below, it largely failed, and those findings (Pet. Cert. at pp. 58 et seq., Appendix E) tell the seamy saga of what transpired in this case. Petitioner won below as a matter of law, and this is the place where issues of law are reviewed; this is no place to quarrel with the trial court's findings.

these are matters to be addressed in a brief on the merits, not here. Suffice it to note here by way of short reply only a few of Respondent's inaccurate assertions:

Item: The subject property is not "surrounded" by single-family zoned land (Br. Opp. at p. 4).[2] Rather, its largest boundary is the Pacific Ocean; it sits on a mesa and is thereby separated by natural topography from nearby single-family zoning on a second side. Its contiguity to such land is thus minimal.

Item: The referendum whether to acquire the subject property (see Pet. Cert. at p. 6) was not "advisory". That is Respondent's self-serving characterization. The referendum proposition began with the words: "*Shall* the City of Santa Barbara purchase for open space purposes the [subject property]. . .?", emphasis added. The use of the word "shall" hardly comports with any notion of "advice". The word "shall" is unequivocally a command. The electorate voted "yes", and thereby expressed its command that the city "shall" acquire the subject property.

Item: The italicized sentence at Br. Opp., p. 5, is distortively signigicant in what it obscures. The city *at that time* carefully refrained from saying publicly that it decided *not* to purchase the subject property; instead it vaguely asserted that it had not decided *to purchase*, thus leaving the subject property blighted under the cloud of the then widely publicized municipal acquisitory plans and activities, and preventing Petitioner from using it.

Item: The assertion at Br. Opp., p. 5, that there was no consideration of acquisition at the zoning hearing, is correct. But what Respondent fails to note is that such con-

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[2]The Brief of Respondent in Opposition is cited here as "Br. Opp.", followed by pertinent page number.

sideration took place at the various illegal, secret "executive" sessions (see Pet. Cert. at pp. 6, 7, 8 and 9).

Item: The undisputed fact of the testimony of an appraiser as to the subject property's market value (Br. Opp., at p. 6) is misleading, because whatever such value, Petitioner lost the property altogether; thus, as far as *he* is concerned, *the City's actions deprived him of everything*. Whatever the property may be theoretically worth, it was taken away from Petitioner. Thus its value only underscores his loss. Even on the Respondent's premise, Petitioner's losses are in the millions.

Finally, *item:* the assertion at Br. Opp. at p. 6, to the effect that *in 1980* (3 years *after* Petitioner lost the property) the Respondent approved subdivision of the subject property into 68 residential lots is not only outside the record, but is misleading as well; Respondent fails to inform the Court that such proposed use was promptly disapproved by the California Coastal Commission[3] which has the last word, and which has consistently taken the position that sound land use planning called for development of the subject property into the very use desired by Petitioner (and endorsed by the original city general plan). Thus, because of the Commission's position, the subject property can only be used for a resort hotel, but because of the City's position it can only be used for single family residences. The upshot of this regulatory Catch-22 is that the property cannot be put to private uses at all — which is what the city had in mind in the first place.

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[3]Note well that the Coastal Commission's dim view of the use of the subject property for single family residential housing was well known. The Commission has throughout been of the view that the subject property should be used *as a resort hotel* (See Pet. Cert. at p. 8).

In sum, Respondent's charges of inaccuracy are themselves untrue.

This case presents this Court with a grave and widespread constitutional issue that is bedeviling the entire country. The Court also has before it a rank injustice that cries out for relief.

Petitioner prays that the writ issue.

Respectfully submitted,

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Attorney for Petitioner.